

IN THE MATTER OF:)
)
Robert Whipple)
Whipple Minor Subdivision Site) Docket No. **CWA-08-2004-0023**
)
Big Sky, Montana,)
)
Respondent.)

I. INTRODUCTION

II. STATUTORY AUTHORITY

III. PARTIES BOUND

IV. STATEMENT OF PARTIES

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CWA and without acknowledging any further liability, Respondent consents to the issuance of this Consent Order and agrees to abide by all of the terms and conditions herein and agrees not to challenge the jurisdiction of EPA or the FINDINGS OF FACT AND OF VIOLATION below in any proceeding to enforce this Consent Order.

V. FINDINGS OF FACT AND OF VIOLATION

1. Robert Whipple (Respondent), owns property in Big Sky, Madison County, Montana; however, Respondent permanently resides at 475 High Street, Mystic, Connecticut 06355.
2. At the time of the alleged violation, Respondent owned and controlled the Whipple Minor Subdivision and Summit View Subdivision in Big Sky Village (Site), located in Big Sky, Montana. The site is located in Section 20, Township 6 South, Range 3 East in, Madison County, Montana. The Site contained 2.51 acres of Palustrine wetlands in five different locations, 0.41 acres of which have been filled and disturbed by Respondent's actions. The affected wetlands in this matter are specifically located and delineated on the map in Attachment 1.
3. On February 16, 1999, the U.S. Corps of Engineers (Corps), Helena Regulatory Office, received an application from Allied Engineering Services, Inc., on behalf of Respondent, for the construction of a pond in the vicinity of the unauthorized discharges. Respondent indicated at this time that no further wetland or stream discharges would occur in the development of the Site. On April 6, 1999, the Corps authorized the construction of the pond under Nationwide Permit Number 26.
4. During the summer of 2001 (approximately May and June), Respondent's agent, discharged earthen fill and graded in jurisdictional wetlands in five different locations, during road construction at the Site, using common earthmoving equipment.
5. In July, 2002, the Corps and EPA observed that unauthorized fill material had been placed in wetlands and waters of the United States. By letter dated August 1, 2002, the Corps stated that Respondent's actions described in paragraph 4 above, required prior Corps authorization and that the authorization applied for in 1999 did not apply to the work performed. Further, the Corps directed Respondent to "cease and desist" any further unauthorized work at the Site.
6. A wetland delineation done by O'Neil Bros. Hydrological Consulting (OBHC) over 4 days in late August and early September of 2002, concluded that there were five Palustrine wetlands on the property covering a total of 2.5. acres, and that 0.41 acres of those wetlands were impacted by the work performed.
7. On May 1, 2003, OBHC submitted, on behalf of Respondent, a Corrective Action Plan to

remove the unauthorized fill and restore the Site. The goal of the plan is to restore the wetlands by re-establishing soils, hydrology and vegetation in all disturbed areas to pre-violation conditions.

8. Since discharging the dredged or fill material described above, Respondent has not been authorized by any permit issued under the CWA Section 404, 33 U.S.C. § 1344, to allow the unauthorized discharges to remain.

9. The wetlands filled and disturbed by the unauthorized activities (the "affected wetlands") provided various functions and values, including: wildlife habitat for birds, mammals, reptiles and amphibians; water quality enhancement; flood attenuation; and/or aesthetics.

10. The fill material referenced in paragraph 4 above constitute "pollutants" within the meaning of CWA Section 502(6), 33 U.S.C. § 1362(6).

11. The earthmoving equipment needed to move the fill material referred to in paragraph 4 above is a "point source" within the meaning of CWA Section 502(14), 33 U.S.C. § 1362(14).

12. Respondent is a "person" within the meaning of CWA Section 502(5), 33 U.S.C. § 1362(5).

13. The affected wetlands are "waters of the United States" within the meaning of 33 C.F.R. Section 328.3(a) and therefore "navigable waters" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

14. CWA Section 301, 33 U.S.C. § 1311, prohibits the discharge of a pollutant from a point source into waters of the United States by a person without a permit issued pursuant to CWA Section 404, 33 U.S.C. § 1344.

15. Neither Respondent, nor Respondent's agent(s), has been authorized by a permit issued under CWA Section 404, 33 U.S.C. § 1344, to conduct the activities described in paragraph 4 above.

16. Respondent's activities as described in paragraph 4 above, without such a Section 404 permit, constitute violations of CWA Section 301, 33 U.S.C. § 1311.

17. Activities to be carried out under this Consent Order are remedial, not punitive, and are achievable as a practicable matter through commonly used construction, digging, filling, revegetation, and best management practices. The actions required by this Consent Order are necessary to achieve the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA Section 101(a), 33 U.S.C. § 1251(a).

18. In order to resolve the violations alleged herein by EPA, Respondent has agreed to comply with this Consent Order and to pay a \$25,000 administrative penalty pursuant to an Order to be issued by EPA pursuant to CWA Section 309(g) (33 U.S.C. § 1319(g)).

19. These preceding FINDINGS OF FACT AND OF VIOLATION and the ORDER FOR COMPLIANCE below have been made after consultation and coordination with the United States Army Corps of Engineers, Omaha District.

VI. ORDER FOR COMPLIANCE

Based upon the foregoing FINDINGS OF FACT AND OF VIOLATION, and pursuant to the Authority vested in the Administrator, EPA, under CWA Sections 308 and 309(a), 33 U.S.C. §§ 1318 and 1319(a), and by her delegated to the undersigned EPA official, it is hereby ORDERED and AGREED:

1. Respondent shall not discharge any pollutant into wetlands or other regulated waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

2. Prior to execution of this Consent Order, Respondent submitted a Corrective Action Plan (hereinafter, the Work Plan) to EPA that provides for full restoration of all impacted wetlands on the Site. See attachment 1. The Work Plan calls for the removal of unauthorized fill, restoration of disturbed areas caused by unauthorized excavation and unauthorized construction of a fire pond. The Work Plan also calls for revegetation in the disturbed areas. .

a. The parties acknowledge and agree that their mutual intent in entering into this Consent Order is that the Work Plan will be fully implemented in 2003. If there are delays beyond the control of Respondent and his agents, EPA will be notified as soon as practicable and EPA will consider an extension of time. Nothing in this section, however, requires EPA to grant such extension of time.

b. Respondent will obtain all necessary permits to accomplish the Work Plan.

c. Respondent shall monitor the success of the project beginning in 2003, and continue annual monitoring until September, 2008, or 5 years from the date of initial planting. Monitoring shall be performed in accordance with the procedures in Attachment 2 of this Consent Order, and monitoring reports shall be submitted to the Corps and EPA no later than November 1st of each year in which monitoring occurs. Monitoring and reporting shall continue until the success of the restoration has been fully demonstrated and accepted in writing by EPA. If an annual monitoring report demonstrates that restoration is not making progress toward meeting the criteria for success, Respondents shall submit the analysis required in subsection (d) below.

d. In the event that restoration fails to meet the criteria for success in the approved wetland mitigation plan, Respondent will repair, replace and maintain any improvements necessary to meet the objectives of the Work Plan. Respondent shall submit to the Corps and EPA, in its annual report or upon realization of project failure, an analysis of the project's failure and a proposed plan for correcting all deficiencies in the mitigation project. The proposed plan for correcting these deficiencies shall include provisions for adequately monitoring the effectiveness of the measures proposed to correct the deficiencies and shall be submitted to EPA for approval.

3. This Consent Order, or the signature pages thereof, may be executed in counterparts, all of which shall have full force and effect as an original, including admission into evidence, and facsimile signatures shall constitute originals for all purposes.

4. Respondent's obligations under this consent order are not severable. In the event that a court of competent jurisdiction enters a final judgment holding invalid any material provision of this consent order, the remainder of the consent order shall be fully enforceable.

5. Any deliverables, plans, reports, specifications, schedules and attachments required by this Consent Order are, upon approval by EPA, incorporated into this Consent Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Consent Order and subject to EPA enforcement action.

6. If any event occurs which causes or may cause delays in the completion of the restoration as required under this Consent Order, Respondent shall notify EPA orally as soon as possible (i.e., by telephone within two business days) and in writing within 10 business days of the date Respondent first knew of the event or should have known of the event by exercise of due diligence. The notice shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Respondent to prevent or minimize the delay, and the timetable by which those measures will be implemented. Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to comply with the notice requirements of this paragraph shall render this paragraph void and of no effect as to the particular incident involved and constitute a waiver of Respondent's right to request an extension of its obligation under this Consent Order based on such incident.

a. If the parties agree that the delay or anticipated delay in compliance with this Consent Order has been or will be caused by circumstances beyond the control of Respondent, the time for performance hereunder may be extended for a period no longer than the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time.

- b. In the event that the EPA does not agree that a delay in achieving compliance with the requirements of this Consent Order has been or will be caused by circumstances beyond the control of the Respondents, EPA will notify Respondents in writing of its decision.
- c. The burden of proving that any delay is caused by circumstances entirely beyond the control of the Respondents shall rest with the Respondents. Increased costs or expenses associated with the implementation of actions called for by this Consent Order shall not, in any event, be a basis for changes in this Consent Order or extensions of time under section (a) of this paragraph. Delay in achievement of one interim step shall not necessarily justify or excuse delay in achievement of subsequent steps.

7. Respondent shall allow or arrange to use its best efforts to allow access by any authorized representatives of EPA, the Corps, the U.S. Fish and Wildlife Service , and/or the State of Montana Department of Environmental Quality, with prior notice and upon proper presentation of credentials, to sites and non-privileged records relevant to this Consent Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Consent Order;
- b. To inspect and monitor compliance with this Consent Order; and
- c. To verify data submitted to EPA.

This Consent Order shall in no way limit or otherwise affect the United States' authority to enter, conduct inspections, have access to non-privileged records, or monitor compliance pursuant to any statute, regulation, permit, or court order. Respondent shall permit such persons to inspect and copy all files, photographs, documents, and other writings, including all sampling and monitoring data, that pertain to with this Consent Order. To the extent that such information is business confidential or proprietary, Respondent shall so advise such persons in writing, and 40 C.F.R. Part 2 procedures shall be followed. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege, the work-product protection or any other privilege recognized by federal law.

8. This Consent Order shall be effective upon execution by the parties.

9. Respondents shall submit all notifications and correspondence to:

Kristine Knutson (8MOO)
U.S. Environmental Protection Agency, Region 8
Montana Operations Office
10 West 15th Street, Suite 3200
Helena, Montana 59626
406.457.5021

10. Except as required in this Consent Order, after issuance of any Corps authorization for the Whipple Minor Subdivision project, Respondents shall submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

11. EPA agrees to submit all notifications and correspondence to:

Mr. Robert Whipple
475 High Street
Mystic, Connecticut 06355

Any party hereto may, by notice, change the address to which future notices shall be sent or the identity of the person designated to receive notices hereunder. Actual receipt by a person specified above of any written notice, whether or not given in accordance with the terms of this paragraph, shall be deemed to be notice given pursuant to the Consent Order.

12. Respondent understands and acknowledges that 33 U.S.C. § 1319(d) authorizes civil penalties of up to \$27,500 per day for each violation of Clean Water Act Section 301, 33 U.S.C. § 1311, and Section 1319(c), 33 U.S.C. § 1319(c) authorizes fines and imprisonment for willful or negligent violations of the Clean Water Act. Issuance of this Consent Order shall not be deemed an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the Clean Water Act for the violations in this Consent Order. Compliance with the terms and conditions of this Consent Order shall not be construed to relieve Respondent of its obligations to comply with any applicable federal, state, or local law.

13. Each party agrees to execute, approve, and adopt any and all instruments, documents, and resolutions as may be reasonably required to effectuate the terms, conditions and provisions contained in this Consent Order. Such instruments, documents and resolutions shall be in form and substance reasonable acceptable to the parties.

14. This Consent Order constitutes the entire agreement of the parties and a complete merger of all prior negotiations and agreements. This Consent Order shall not be modified except in writing signed by all of the parties hereto or their authorized representatives. Minor modifications to the Consent Order, such as granting extensions to meet scheduled milestones in the mitigation plan, can be approved by designated assignees.

BY: **SIGNED** _____
Robert Whipple

DATE: **12/10/03** _____

BY: **SIGNED**_____

DATE: **12/19/03**_____

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance, and
Environmental Justice
U.S. Environmental Protection Agency, Region 8

Attachments

1. Corrective Action Plan dated May 1, 2003
2. 1996 Corps Habitat Mitigation and Monitoring Proposal Guidelines

IN THE MATTER OF: Robert Whipple, Whipple Minor Subdivision.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 23, 2003, the original and one copy of the ADMINISTRATIVE ORDER ON CONSENT were hand carried to the Regional Hearing Clerk, EPA Region VIII, 999 18th Street, Suite 300, Denver, Colorado, and that a true and copy of the same was delivered as follows:

Via certified mail to:

Ralph Steele
Tarlow & Stonecipher, P.L.L.C.
1439 West Babcock
Bozeman, MT 59715

Doris Fischer
Madison County Planning Office
P. O. Box 278
Virginia City, MT 59755

Date: **12/23/03**

By: **SIGNED**
Judith McTernan

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE
CONTACT THE REGIONAL HEARING CLERK.**

**THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON DECEMBER 23,
2003.**

